Office-Supreme Court, U.S.
FILED
FEB 24 1981
ALEXANDER L. STEVAS,
CLERK

No. 80-1251

In the Supreme Court of the United States

October Term, 1980

UNITED STATES OF AMERICA,
Petitioner,

v.

VOGEL FERTILIZER COMPANY,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

RESPONDENT'S BRIEF IN OPPOSITION TO PETITION FOR CERTIORARI

Ronald C. Jensen, of
BAIRD, HOLM, McEACHEN,
PEDERSEN & HAMANN
1500 Woodmen Tower
Omaha, NE 68102
(402) 344-0500
Attorney of Record for Respondent

Kent O. Littlejohn, of
BAIRD, HOLM, McEACHEN,
PEDERSEN & HAMANN
1500 Woodmen Tower
Omaha, NE 68102
(402) 344-0500
Attorney of Counsel for Respondent

PRIESMAN GRAPHICS—OMAHA, NEBRASKA

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The Respondent, Vogel Fertilizer Company, respectfully requests that this Court deny the petition for writ of certiorari seeking review of the United States Court of Claims opinion in this case.

THE QUESTION PRESENTED FOR REVIEW

The question presented for review is simply whether Vogel Fertilizer Company, the Respondent, and Vogel Popcorn Company must be considered as a "brother-sister controlled group" under Section 1563(a)(2) of the Internal Revenue Code of 1954 (26 U.S.C.) for purposes of the corporate surtax exemption under I.R.C. § 1561(a) and § 11(d). The resolution of this question is directly dependent upon whether the Treasury Regulation promulgated by the Government under I.R.C. § 1563 (Treas. Reg. § 1.1563-1(a)(3)) is valid despite its effect of unilaterally expanding the scope of I.R.C. § 1563 beyond that intended by Congress.

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Miscellaneous:

1 *Mertens Law of Federal Income Taxation*, § 3.21 (rev. 1974) 6

STATEMENT OF THE CASE

For purposes of this particular brief, Respondent accepts most of the Statement of the Case made in the Petition. See Petitioner's Brief for Certiorari at pp. 1-5. However, the following additional factual points should be made:

1. For purposes of this case, the stock held by either Richard Crain and Arthur Vogel cannot be attributed to the other under the attribution rules of I.R.C. § 1563(d). Furthermore, Arthur Vogel cannot be considered the constructive owner of the shares in Vogel Popcorn Company held by him as Trustee. (Petitioner's Brief for Certiorari at 2a).

2. Petitioner has asserted as part of the factual foundation of this case that Respondent has "conceded that the governing Regulations (Section 1.1563-1(a)(3)(ii)) explicitly provided that 'the five or fewer persons' can own 80% of the stock of each corporation, singly or in combination, and included an example corresponding exactly to this case." Petitioner's Brief for Certiorari at 3. This assertion is too broad, as the Respondent's only concession has been to the effect that if Example (1) of Treas. Reg. § 1.1563-1(a)(3)(ii) is valid, then Richard Crain's stock can be counted toward the requisite 80 percent. Respondent has consistently argued, however, that the Regulation is unreasonable and clearly inconsistent with the statute. (Petitioner's Brief for Certiorari at 6a.)

3. The Court of Claims, after reviewing the available legislative history, found that the Treasury's own explanation of I.R.C. § 1563(a)(2) "clearly indicates that each of the five or fewer persons considered under the 80-percent test must hold some stock in each corporation in the controlled group." Petitioner's Brief for Certiorari at 21a. Therefore, as part of the basis of its opinion, the

Court of Claims noted that "It would be a gross usurpation of the power of Congress to draft tax statutes to allow the Treasury to explain a legislative proposal in one way and then to interpret it after enactment in a far more expansive fashion." (Petitioner's Brief for Certiorari at 24a.)

4. The Court of Claims did recognize the broad discretion in most instances of the Commissioner to prepare regulations giving detailed content to, filling in the details of, and explaining and defining the various provisions of, the Internal Revenue Code. That Court held, however, that the Commissioner here had overstepped his authority by imposing a regulation that was "an impermissible alteration of the statute." (Petitioner's Brief for Certiorari at 34a.)

SUMMARY OF ARGUMENT

The United States Court of Claims is a court of national jurisdiction in matters of federal taxation, unlike the various Circuit Courts of Appeal. The decision below of the Court of Claims correctly recognized that Treas. Reg. § 1.1563-1(a)(3) unjustifiably expanded I.R.C. § 1563 (a)(2) beyond what was intended by the legislature when that statute was enacted. This Court, therefore, need not grant the writ for certiorari on the basis of either error or conflict, as the Government alleges, as denial would cause the Court of Claims decision to be, in effect, the correct and uniform rule on a nationwide basis as to this particular aspect of the administration of the revenue laws. If I.R.C. § 1563(a)(2) then requires further clarification, it should then be the duty of the legislature rather than this Court (or the Government by regulation) to so rewrite I.R.C. § 1563(a)(2).

For these and other reasons, it is respectfully argued that the petition for a writ of certiorari should be denied.

REASONS FOR DENYING THE WRIT OF CERTIORARI

1. The decision entered by the Court of Claims clearly reflects the careful and judicious review by that Court of all of the arguments and authorities raised to this point by the Government in this and the other cases discussing the issue at hand. The Government has been unable to raise any new arguments in its Petition that would, in the opinion of the Respondent, have caused that decision to change. Despite the Government's allegations to the contrary in its brief, the Court of Claims has correctly interpreted the statute in question, and has not made any fundamental error requiring this Court's review. See generally, Petitioner's Brief for Certiorari at 7-13.

Furthermore, the Court of Claims decision has been reinforced by receiving wholesale approval in an opinion written by the Fifth Circuit Court of Appeals, *Delta Metalforming v. Commissioner*, No. 78-3699 (Dec. 8, 1980), on the exact issue herein. It is argued that the Court of Claim's reasoning is most persuasive and sound, and that the issue has been fully considered and correctly decided. It is submitted that even if this Court would see fit to grant the writ of certiorari, it will ultimately come to the same conclusion that Treas. Reg. § 1.1563-1(a)(3) is invalid. The Government, therefore, cannot be found to have carried its burden of establishing error on the part of the Court of Claims, and consequently is not able to establish sufficient justification for the issuance of a writ of certiorari.

2. There is no doubt that the Court of Claims decision below is at odds with decisions previously entered by the Second, Fourth, and Eighth Circuit Courts of Appeal. *See, e.g., Fairfax Auto Parts of Northern Virginia, Inc. v. Commissioner*, 548 F.2d 501 (4th Cir. 1977),

rev'g 65 T.C. 798 (1976), cert. denied, 434 U.S. 904 (1977); *T. L. Hunt, Inc. v. Commissioner*, 562 F.2d 532 (8th Cir. 1977), rev'g 35 T.C.M. 966 (1976); *Allen Oil Co. v. Commissioner*, 614 F.2d 336 (2d Cir. 1980), rev'g 38 T.C.M. 355 (1979). It is important to note, however, that the Court of Claims follows a course first blazed (and still followed) by the Tax Court and recently approved by the Fifth Circuit, all despite the opinions entered by the Second, Fourth, and Eighth Circuits. See the cases cited by the Court of Claims, Petitioner's Brief for Certiorari at 6a-7a; *Delta Metalforming v. Commissioner*, No. 78-3699 (5th Cir., Dec. 8, 1980). Because of the Court of Claims unique status as a court with national jurisdiction in tax matters, however, this difference of opinion need not be considered so serious as to require the expenditure of this Court's precious resources through the grant of a writ of certiorari.

The Court of Claims broad jurisdiction is defined in the Judicial Code as follows:

> "Claims against the United States generally; . . .
>
> "The Court of Claims shall have jurisdiction to render judgment upon any claim against the United States founded either upon the Constitution, or any Act of Congress, or any regulation of an executive department, or upon any express or implied contract with the United States, or for liquidated or unliquidated damages in cases not sounding in tort . . ." 28 U.S.C. § 1491.

Accordingly, tax claims based on the question raised herein may be brought to the Court of Claims regardless of the point of origin, even if such origin is within the jurisdictional boundaries of the Second, Fourth or Eighth Circuits, or any other circuit.

This Court's denial of the writ of certiorari requested by the Government would, obviously, allow the Court of Claims decision to stand, and thus become precedent nationwide for those taxpayers concerned with this issue. Since every such taxpayer, no matter where situated, could then either take their case to the Court of Claims and/or utilize *Vogel Fertilizer* as *stare decisis*, the denial of the request for a write of certiorari would have the effect of establishing and settling the law concerning the definition of a "brother-sister corporation" without the necessity for full review by this Court.[1] Cases currently pending or on appeal could be settled very simply in the same manner by citing the Court of Claims decision.

Hence, the Government's fears that the "conflict" would affect the uniform administration of the revenue laws, and thus require this Court to grant its request for a writ of certiorari, are unfounded. The situation is in reality quite the opposite — denial of the request for certiorari would have the effect of establishing a uniform rule through the national jurisdiction of the Court of Claims. It would then be the rightful responsibility of the legislature to rewrite I.R.C. § 1563(a)(2) if further clarification or change was deemed necessary.

3. The Petitioner has misconstrued the Court of Claims position with regard to the Treasury Regulation in question. The Court of Claims plainly was looking not only at whether Treas. Reg. § 1.1563-1(a)(3) was a reasonable interpretation of the statute, but also whether it was plainly inconsistent with the statute and the intent of Congress in enacting such statute.

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[1] It is well understood by Respondent that in most instances, the denial of a writ of certiorari is not intended or designed to reflect this Court's views as to the merit of any particular case. However, in this instance it is urged that such a denial would serve a valid purpose.

The Court of Claims held that the Regulation was *both* "plainly inconsistent" with the statute *and* implemented the statute in an unreasonable manner. The Court of Claims stated: "In this case, therefore, the regulation either adds nothing not already in the statute or is inconsistent with the statute." Petitioner's Brief for Certiorari at 34a. The Court of Claims also stated: "In addition to concluding that Treas. Reg. § 1.1563-1(a)(3) is inconsistent with Congress' intent as evidenced by the legislative history, we have further determined that the regulation is an unreasonable interpretation of the statute." Petitioner's Brief for Certiorari at 28a. Hence, despite the arguments of the Government, the Regulation fails under the very test cited by the Government and based on *Commissioner v. South Texas Lumber Co.*, 333 U.S. 496 (1948) and that case's progeny. See Petitioner's Brief for Certiorari at 12.

The Treasury simply should not be allowed to unilaterally expand the scope of I.R.C. § 1563 by regulation beyond that intended by Congress. As the Court of Claims clearly recognized, once Congress has established the scope and impact of a statutory provision, the Commissioner cannot expand the intended impact by adding to the statute what he thinks Congress has overlooked, even if for the purpose of improving the health of the fisc or for improving the phraseology of the statute. If it is shown, as it has herein, that a situation is not considered by Congress to be an "abuse," then the Commissioner by regulation is not entitled or empowered to arbitrarily label that situation an "abuse" situation and regulate against it. 1 *Mertens Law of Federal Income Taxation* § 3.21 (rev. 1974); *Arkansas-Oklahoma Gas Co. v. Commissioner*, 365 F.2d 760 (5th Cir. 1966); *United States v. Calamaro*, 354 U.S. 351 (1957). In other words, a regulation cannot take away what the Congress has given, as Treas. Reg. § 1.1563-1(a)(3) is attempting to do in this matter. *Mississippi*

River Fuel Corp. v. United States, 314 F.2d 953 (Ct. Cl. 1963).

CONCLUSION

It is respectfully argued that Petitioner has failed to sustain its burden of establishing special and important reasons why the writ should be granted. The Court of Claims correctly found that Treas. Reg. § 1.1563-1(a)(3) is invalid and unjustifiably expanded I.R.C. § 1563(a)(2). Therefore, it is submitted that the Petitioner's request for a writ of certiorari should be denied.

Respectfully submitted.

Ronald C. Jensen
Attorney of Record for Respondent
BAIRD, HOLM, McEACHEN,
PEDERSEN & HAMANN
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

Kent O. Littlejohn
Attorney of Counsel for Respondent
BAIRD, HOLM, McEACHEN,
PEDERSEN & HAMANN
1500 Woodmen Tower
Omaha, Nebraska 68102
(402) 344-0500

February, 1981